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No. 704

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES, PETITIONER

v.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 14–17) is reported in 52 F. (2d) 1030.

JURISDICTION

The judgment of the Court of Claims was entered on January 27, 1932. (R. 21.) The petition for a writ of certiorari was filed on February 13, 1932, and was granted on March 21, 1932. (R. 22.) The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a claim for refund filed by the Alien Property Custodian on January 7, 1926, more than four years after final payment of the estate tax, was barred by the provisions of Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921 and subsequent revenue Acts.

2. Whether the amount paid to the State of California under the California Inheritance Tax Act of 1913 was a lawful deduction from the gross estate under Section 203 (a) (1) of the Revenue Act of 1916.

STATUTES AND REGULATIONS INVOLVED

These are printed in the Appendices, *infra*, pp. 24–28.

STATEMENT

This suit was originally brought in the Court of Claims by the residuary legatees of the estate of Rosa von Zimmermann, a German alien, who died testate at her residence in Pasadena, California, on April 25, 1917 (R. 11), to recover an alleged overpayment of the Federal estate tax on the ground that the amount paid by way of inheritance tax to the State of California should have been allowed as a deduction from the gross estate. The executors of the estate, both of whom were citizens of the United States, acting under letters testamentary issued by the Superior Court of the State of California for the County of Los Angeles, filed a Federal estate-tax return under the Revenue Act of

1916, on April 19, 1918, and on the same day paid the amount of tax shown thereon. (R. 12.) On August 10, 1918, the Commissioner of Internal Revenue assessed an additional tax, which was paid on September 10, 1918. (R. 12.) The California inheritance tax was paid by the executors on October 23, 1918. (R. 13.) No deduction for this inheritance tax was made in the return filed or in the determination made by the Commissioner. (R. 13.)

The residuary legatees, respondents herein, were residents and citizens of Germany. (R. 12.) On June 12, 1918, the Alien Property Custodian, acting under the authority of the Trading with the Enemy Act of October 6, 1917, and the executive orders issued thereunder, notified the executors to convey, transfer, assign, deliver, and pay to him all the right, title, and interest of the residuary legatees in the estate. (R. 12, 17–19.) No further action was taken by the Alien Property Custodian until September 29, 1922, when he filed a petition in the Superior Court of the State of California in and for the County of Los Angeles, requesting distribution of the estate. (R. 13.) On October 26, 1922, the Court ordered distribution, and the residue of the estate, after payment of debts and specific legacies, was delivered and paid over to the Alien Property Custodian. (R. 13.) On or about the same date the executors, having rendered a final account, were discharged. (R. 12.)

On December 27, 1923, the residuary legatees filed claims for refund on the sole ground that cer-

tain assets included in the gross estate had been overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim on the same ground. (R. 13.)

On November 23, 1925, the Commissioner of Internal Revenue was advised by letter on behalf of the residuary legatees and the Alien Property Custodian that refund was also claimed on the ground that the sum paid to the State of California by way of inheritance tax should have been allowed as a deduction from the gross estate for the purposes of the Federal estate tax. (R. 13.) On January 7, 1926, more than seven years after final payment of the estate tax, the Alien Property Custodian filed a formal claim for refund on the same ground. (R. 13, 20, 21.) This claim was rejected by the Commissioner on July 11, 1928, for the stated reason that under the laws of California the State inheritance tax is not a charge against the estate within the meaning of Section 203 of the Revenue Act of 1916. (R. 13–14.)

Suit was instituted by the residuary legatees on December 18, 1928. (R. 7.) The Court of Claims held on November 2, 1931, that the claim for refund filed by the Alien Property Custodian on January 7, 1926, was timely and that the residuary legatees were entitled to recover the sum of $23,563.03, which it ordered to be paid with interest to the Alien Property Custodian "to be administered according to law." (R. 14.) On January 26, 1932, respondents filed a motion for leave to file an

amended petition joining the Alien Property Custodian as a party plaintiff. On January 27, 1932, the Court of Claims allowed the motion, entered an order vacating its former judgment and rendered a judgment in favor of respondents. (R. 21.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred—

1. In holding that the Alien Property Custodian acquired immediate possession of the residuary legatees' interest in the estate by virtue of the notice to the executors dated June 12, 1918, in spite of the fact that he did not take physical possession of any part of the estate until 1922.

2. In holding that the enemy status of the residuary legatees prevented the executors from filing a claim for refund.

3. In holding that the refund claim filed by the Alien Property Custodian on January 7, 1926, was timely.

4. In holding that the inheritance tax paid to the State of California under the California Inheritance Tax Act of 1913 was a charge upon the estate within the meaning of Section 203 (a) (1) of the Revenue Act of 1916, which could be deducted from the value of the gross estate in determining the Federal estate tax.

5. In rendering judgment in favor of respondents.

SUMMARY OF ARGUMENT

I

Recovery of the alleged overpayment of the Federal estate tax is barred because no claim for refund was filed within the four-year period prescribed by the Revenue Acts. It does not appear that the residuary legatees ever filed a formal claim raising the question of the deductibility of the California inheritance tax now urged. The only formal claim raising this question was filed by the Alien Property Custodian on January 7, 1926, more than seven years after final payment of the tax.

The executors remained in office for more than four years after the tax had been paid. During that period they might have filed a claim. The notice and demand served upon them by the Alien Property Custodian under date of June 12, 1918, did not deprive them of this power, since that notice merely substituted the Custodian in the place of the alien enemy legatees. Nor were they under any disability with respect to seeking a refund by reason of the fact that the residuary legatees had no access to our courts. The executors represented the estate as a whole rather than any particular beneficiaries under the will. Their failure to file a claim in time conclusively barred any possible right to a refund.

If the foregoing contentions are correct, the question whether the statute of limitations runs against the Alien Property Custodian as an agent of the

Government is irrelevant, since the claim was barred prior to the time when he could have sought any refund. But in any event we believe that the statute of limitations applicable to tax refunds does run against the Custodian. When seeking a refund from the Government he is acting in behalf of the taxpayer and is governed by all the restrictions imposed on taxpayers generally. He is not, however, under a disability to sue in our courts by reason of the enemy status of the residuary legatees, since he was designated by the Government to hold enemy property.

II

The Revenue Act of 1916 permits the deduction from the gross estate only of charges that affect the estate as a whole and not those that affect solely the rights of individual beneficiaries. The California courts have declared that the State inheritance tax is imposed on the beneficiaries' right of succession. This interpretation of the State law must be accepted as controlling in this case. It has been recognized by this Court as a true statement of the character of the tax. Accordingly, respondents are not entitled to the deduction claimed.

ARGUMENT

I

THE CLAIM FOR REFUND FILED BY THE ALIEN PROPERTY CUSTODIAN ON JANUARY 7, 1926, WHICH FORMS THE BASIS FOR THIS ACTION, WAS BARRED BY THE STATUTE OF LIMITATIONS

The Court of Claims held that the claim for refund upon which this suit is predicated was not

barred by the statute of limitations. It reached this conclusion on the stated grounds that the executors could not have filed a claim during their tenure of office because they represented alien enemies who were denied access to our courts, and because the Alien Property Custodian had acquired possession and control of the residue of the estate as of June 12, 1918, and that the statute of limitations did not run against the Alien Property Custodian, because he was an officer or agent of the United States. It is our contention that the executors might have filed a claim, that they alone were the proper parties to do so, and that upon their failure to act within the four-year period prescribed by the statute the claim was conclusively barred. If we are correct in this contention, it is unnecessary to consider whether the statute of limitations runs against the Alien Property Custodian, inasmuch as the bar of the statute had fallen prior to the time when he obtained actual possession and control of the residuary estate. Nor is it necessary to consider whether the claims filed by the legatees on December 27, 1923, were timely, since they did not raise the question of the deductibility of the California inheritance tax now relied on as the ground for refund.

A. The Alien Property Custodian did not acquire such an interest in the estate prior to the discharge of the executors as to deprive the executors of the power to file a claim for the refund of taxes overpaid by them

Final payment of the estate tax was made by the executors on September 8, 1918. Consequently, the

time for filing a claim for refund expired on September 8, 1922, approximately six weeks prior to the date on which the executors were discharged after filing their final account in the probate court. Under the Treasury Regulations (*infra*, pp. 25–26) and the established administrative practice a claim for refund of estate taxes which have been overpaid must be filed by the executor or administrator. If no claim is filed by the legal representative of the estate, the persons beneficially interested in securing a refund may file claims to the extent of their respective interests. See Regulations 37 (1919 and 1921 revisions), Articles 106, 110, *infra*, pp. 25, 26. But it seems clear that if the statutory period has elapsed prior to the discharge of the executor or administrator and no claim has been filed the beneficiaries can not thereafter recover.

Respondents contend, however, that in the instant case the Alien Property Custodian had acquired such possession and control of the residuary estate as to deprive the executors of the right to file a claim for the refund of taxes which might ultimately inure to the benefit of the enemy aliens.

The question turns on the effect of the notice served by the Alien Property Custodian upon the executors under date of June 12, 1918. In this connection it is necessary to distinguish two classes of cases—those in which the Alien Property Custodian has served notice of claim and demand for transfer and delivery of specified property, either tangible or intangible, which belongs to or is being

held for the benefit of an alien enemy, and those in which the Custodian has given a similar notice and demand as to an interest, not definitely ascertained, in designated property where something remains to be done before the interest can be definitely ascertained or the property precisely identified. In the first type of case, the Custodian is entitled to immediate possession. *Central Union Trust Company* v. *Garvan,* 254 U. S. 554. The instant case, however, is of the second class. Here the notice given by the Custodian stated that (R. 18, 19)—

> I, A. Mitchell Palmer, Alien Property Custodian, * * * do determine that—
>
> Gertrude Luckhardt, * * * is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to the estate of Rosa Von Zimmerman, deceased.
>
> I, as Alien Property Custodian, hereby require that every right, title, and interest of said enemy in and to the estate above described * * * shall be by you conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian, * * * and that any money or property now or hereafter held by you which the enemy may at any time or times, now or hereafter, be entitled to receive either upon or without demand, shall at such time or times be conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian. * * *

This notice and demand did not purport to identify any particular property as belonging to enemy aliens, but clearly recognized that the exact interest of the aliens was not yet capable of determination, and consequently it was intended to and did have the effect only of substituting the Custodian in the place of the residuary legatees and vesting in him the right to seize such property as they might thereafter be found entitled to receive. The delivery of possession to the Custodian was thus postponed until distribution by the executors and the approval of their accounts by the probate court. See *Kahn* v. *Garvan*, 263 Fed. 909 (S. D. N. Y.); *Miller* v. *Rouse*, 276 Fed. 715 (S. D. N. Y.); *Isenberg* v. *Trent Trust Company*, 26 F. (2d) 609 (C. C. A., 9th). The Custodian did not acquire possession, either actual or constructive, since there was no specific property which he could sequester. Nor did he purport to interfere with the executor's right of possession, or to control them in the administration of the estate as distinguished from its ultimate distribution. Despite the notice it was clearly contemplated and understood that they should continue to collect the assets, pay the debts, and perform all the usual functions of their office, subject only to the duty of paying over to the Custodian such property as would otherwise have been distributed to the residuary legatees at the time of final settlement. It appears that the Custodian did wait several years before pressing for the action

in the probate court which would permit distribution.

Pending such settlement, the Custodian had no greater rights than the residuary legatees would have had; he was merely a legatee under the will. *Miller* v. *Rouse, supra,* p. 716. As a legatee he had no standing before the Commissioner of Internal Revenue to secure a refund of taxes. The power and duty to file a refund claim remained in the executors until their discharge and was, we submit, in no way affected by the Custodian's notice to and demand upon the executors.

B. The disability of the residuary legatees to bring suits in our courts did not deprive the executors of the power to file a claim for refund

The executors in the instant case were citizens of the United States (R. 12) and as such clearly entitled to claim and sue for a refund, unless it be considered that the enemy character of the residuary legatees deprived the executors of access to the Commissioner of Internal Revenue.

The rule denying access by alien enemies to our courts is founded on the necessity of withholding all possible aid and comfort from the opposing forces. *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317, 323. It has usually been invoked in the past as a reason for the suspension of the statute of limitations, in order to permit the alien to sue within a reasonable time after the cessation of hostilities. *Hanger* v. *Abbott,* 6 Wall. 532; *Freeborn* v. *The*

Protector, 9 Wall. 687. This Court said in the *Birge-Forbes Company case, supra* (p. 323):

> There is nothing "mysteriously noxious" (*Coolidge* v. *Inglee*, 13 Massachusetts, 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side.

The defense of "alien enemy" is not favored by the courts. *Schaffenius* v. *Goldberg* (1916) 1 K. B. 284; *Society for the Propagation of the Gospel* v. *Wheeler*, Fed. Cas. No. 13156 (pp. 756, 763). There is no reason to assume that if a claim for refund had been filed such a defense would have been raised. We know of no instance of a rejection of a claim on this ground. The Government was adequately protected by reason of the fact that any and all property to which residuary legatees ultimately became entitled was taken over by the Alien Property Custodian and therefore could not have brought aid and comfort to the enemy. See *Weiditschka* v. *Supreme Tent Knights of Maccabees of the World*, 188 Iowa, 183, 191, 195.

The cases upon which respondents and the court below rely do not appear to us to be controlling. In *Borovitz* v. *American Hard Rubber Company*, 287 Fed. 368 (N. D. Ohio, E. D.), suit was brought by an administrator under the Ohio wrongful death statute to recover damages for the death of the intestate. The court held that since the beneficiaries were alien enemies the suit could not be maintained. It pointed out, however, that under the statute in

question an administrator was a mere nominal party, that his right to recover was measured by the rights of the beneficiaries, and that neither the creditors of the estate nor any other person except the next of kin had any interest in the fund recovered. See also *Weiditschka* v. *Supreme Tent of Knights of Maccabees of the World, supra; Dangler* v. *Hollinger Gold Mines,* 23 Dominion Law Reports, 384. In the case last cited the court expressed grave doubt as to whether the rule would apply if the administrator were seeking to recover an asset of the estate.

In *Crawford* v. *The William Penn,* Fed. Cas. No. 3372, the plaintiff was trustee for an enemy alien and was suing in his sole behalf, just as in the cases cited in the previous paragraph the plaintiffs were suing solely in behalf of the beneficiaries under the death statutes or life policies.

Here it seems clear that, regardless of who might ultimately benefit by the allowance of a refund, any claim that might have been filed by the executors would have been filed on behalf of the estate as a whole rather than on behalf of the residuary legatees. The executors should not, we submit, be regarded as trustees for the ultimate beneficiaries so as to bring them within the rule of the *Crawford case, supra.* To do so would be extending the rule of disability beyond the bounds of necessity and beyond the limits of the decided cases.

We know of no case in which the precise question under discussion has been presented. It is well

settled that a devise or bequest is not invalid because the devisee or legatee is an alien enemy. *In re Gregg's Estate,* 266 Pa. 189, certiorari denied *sub nom. Gregg* v. *Garvan,* 252 U. S. 588. And probate will not be denied merely because of the enemy status of one or more of the beneficiaries under the will. *Riddell* v. *Fuhrman,* 233 Mass. 69. The court will order that the enemy's share of the estate be held by the executor or administrator for the duration of the war, or that it be paid over to the officer of the United States designated to take custody of it. *Matter of Kelly,* 101 Misc. Rep. 495. Similarly, we submit, there should be no objection to permitting an executor who is a resident citizen of the United States to take such steps as may be necessary to collect assets of the estate merely because certain of the legatees are alien enemies. Accordingly, throughout the entire period before the statute of limitations ran, the executors could have filed a claim for refund and since they failed to do so, the right to refund (even if the claim would otherwise have been valid) was barred when the Custodian came into actual possession of the property of the residuary legatees in October, 1922.

C. Claims for refund filed by the Alien Property Custodian are subject to the usual limitations prescribed by the revenue acts

We contend, for the reasons previously stated, that the filing of a claim for refund was barred before the Custodian acquired possession of the prop-

erty of the residuary legatees, and that consequently the question whether the statute of limitations runs against the Custodian is irrelevant. But even if that question is involved, we submit that the decision of the court below on the point was erroneous.

Section 24 of the Trading with the Enemy Act, as amended by the Act of March 4, 1923, c. 285, 42 Stat. 1511, 1516, authorized the Alien Property Custodian to pay all taxes assessed against money or other property sequestered by him, but made no provision with respect to securing refunds of taxes overpaid by him or by the person who had control and possession of the property prior to its sequestration. This section was subsequently amended by Section 18 of the Settlement of War Claims Act of March 10, 1928, c. 167, 45 Stat. 254, 276, which made special provision in paragraphs (c) and (d) for determination of the tax on income derived from the sale or exchange of property held by the Alien Property Custodian, and provided further as follows:

> (f) The benefits of subsections (c), (d), and (e) shall be extended to the taxpayer if claim therefor is filed before the expiration of the period of limitations properly applicable thereto, or before the expiration of six months after the date of the enactment of the Settlement of War Claims Act of 1928, whichever date is the later. The benefits of subsection (d) shall also be extended to the

> taxpayer if claim therefor is filed before the expiration of six months after the return of the proceeds.

Paragraph (f), quoted above, was substituted in conference for an amendment proposed by the Senate, which would have permitted the filing of all refund claims at any time within six months after the enactment of the statute. The statement of the managers on the part of the House contains the following reference to this substitution (Congressional Record, 70th Congress, First Session, p. 3782):

> * * * The House recedes with an amendment providing * * * that the allowance of additional time for filing claims and for making assessments should apply only in cases where the tax liability is changed by the provisions of this section; * * *.

It seems clear, therefore, that Congress contemplated that claims for refund in respect of taxes paid on property owned by alien enemies must be filed within "the period of limitations properly applicable thereto," except in cases covered by paragraphs (c), (d), and (e) of Section 24 of the Trading with the Enemy Act as amended. The statute has been so interpreted in General Counsel's Memorandum 5000, VII–2 Cumulative Bulletin 176, where it was stated that the periods of limitation prescribed by the various Revenue Acts upon the refunding of taxes apply to claims filed by the

Alien Property Custodian except as otherwise specifically provided. See also General Counsel's Memorandum 4978, VII–2 Cumulative Bulletin 163. While the ruling of the General Counsel relates in terms to cases in which the tax was paid by the Alien Property Custodian himself, its reasoning is broad enough to cover a case such as this, where payment was made prior to the sequestration of the property.

The decisions cited by respondents (Brief in opposition to certiorari, pp. 29, 30) are not controlling. *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456, was a suit by the Director General of Railroads to recover for demurrage charges arising during the period of Federal control. This Court held that the action was in effect a suit by the United States in its governmental capacity, and was therefore subject to no time limitation. But here the Alien Property Custodian, although undoubtedly an agent of the Government in one sense, was, when seeking refund of taxes, acting primarily as the representative of the taxpayers. The prosecution of a claim for refund which, if successful, would result in the payment of money from the Treasury, would not be an act done in the interest of the United States in a strict sense unless it be said that fiscal interests were overridden by the interest of the United States in protecting the alien cestuis for whom the necessities of war required it to act as trustee. If he were regarded as an agent of the Government in this action, we should have the

anomalous situation of a claim made by the Government against itself.

This is not a case in which the application of the statute of limitations would cause the public interests to be prejudiced by the negligence of governmental officers, as in *United States* v. *Nashville &c., Ry. Co.*, 118 U. S. 120. The refund which the Custodian seeks to recover is a claim against the Government and, if granted, will inure to the benefit of the taxpayers. The reason which forms the basis for the rule that the statute does not run against the Government or its officers, is, therefore, not present in the instant case, and we submit that in the absence of a clear statutory provision and in view of the implication contained in the Trading with the Enemy Act, referred to above, the rule does not apply.

It may, perhaps, be suggested that if the Alien Property Custodian be regarded as the representative of the taxpayers, the statute of limitations should be suspended as to him on account of the disability of his principals. But the reasons for such disability do not obtain where the agent or trustee for the alien enemy is the person designated by the Government to hold the property of alien enemies during the period of hostilities. Clearly the Custodian does not partake of the disability of the residuary legatees. Otherwise he would have been unable to petition the probate court for distribution of the estate, as the facts show he did. We submit, therefore, that the running of the statute of limita-

tions against him was not suspended on this, or any other, ground.

Respondents annexed to their brief in opposition to the petition for certiorari a copy of a memorandum prepared by the Solicitor of Internal Revenue under date of June 13, 1924, holding that the claim filed by the Alien Property Custodian in the instant case was not barred by the statute of limitations. This ruling would appear to have been reversed by General Counsel's Memorandum 5000, *supra*. In any event, we submit that, for the reasons stated above, the reasoning upon which it is based can not be sustained.

II

THE CALIFORNIA INHERITANCE TAX WAS NOT DEDUCTIBLE FROM THE GROSS ESTATE FOR THE PURPOSE OF THE FEDERAL ESTATE TAX

Section 203 (a)(1) of the Revenue Act of 1916, *infra*, p. 24, under which the tax in the instant case was imposed, permits the deduction from the gross estate of sums constituting charges against the estate under the laws of the jurisdiction in which the estate is being administered. This Court has decided that charges against the estate are charges that affect the estate as a whole. Taxes assessed on the rights of succession of the individual beneficiaries are not deductible. *Leach* v. *Nichols*, October Term, 1931, No. 468, decided March 14, 1932; *New York Trust Company* v. *Eisner*, 256 U. S. 345, 350; *United States* v. *Woodward*, 256 U. S. 632, 635.

The character of the State tax is to be determined by reference to the decisions of the highest court of the State when such decisions are available, and the determination of the State court is controlling. *New York Trust Co.* v. *Eisner, supra; Keith* v. *Johnson,* 271 U. S. 1; *Leach* v. *Nichols, supra.*

The tax sought to be deducted was levied under the California Inheritance Tax Act of 1913, as amended. Cal. Stats. 1913, p. 1066; Cal. Stats. 1915, pp. 418, 435. The decisions of the highest court of the State leave no doubt that the tax imposed by that Act was a tax upon the beneficiary's right of succession and was not a charge upon the estate. *Estate of Kennedy,* 157 Cal. 517; *Estate of Hite,* 159 Cal. 392; *Estate of Miller,* 184 Cal. 674; *Estate of Potter,* 188 Cal. 55. In *Estate of Kennedy, supra,* the court said (p. 526):

> The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir.

While the tax there under discussion was that provided for by the Act of 1905, there was no substantial difference between that Act and the Act of 1913 involved in this case. This Court has already recognized the California decisions as establishing that the inheritance tax prior to 1917 was a tax on succession. *Stebbins* v. *Riley,* 268 U. S. 137, 144.

It is true that in *Estate of Hite, supra,* it was held that the inheritance tax under the Act of 1905 was to be measured by the value of the estate at the time of the decedent's death. There certain assets of the estate had been misappropriated by the executor and the question was whether those assets were to be taken into account in computing the tax. The decision was rested upon the theory that the residuary estate vests in the beneficiaries at the instant of death, subject only to deductions for lawful expenses of administration. There is no necessary inconsistency between that case and the *Kennedy case, supra,* but if any doubt remained as to the character of the tax it is resolved by the more recent decision in *Estate of Miller, supra,* which expressly approved the characterization of the tax given in the *Kennedy case.*

The respondents rely on certain language contained in *Estate of Letchworth,* 201 Cal. 1, where it was said that the State inheritance tax is imposed on the transfer of property or on the right to succeed to property. While we do not concede that this language is in conflict with our position, it may be observed that the scope and effect of the California tax were substantially changed in the Acts of 1917 and subsequent years. See *Estate of Watkinson,* 191 Cal. 591, 595; *Stebbins* v. *Riley, supra,* p. 144. Whether this change affected the character of the tax is not material to the instant case, but if the *Letchworth case, supra,* be regarded as supporting

respondents' contentions, we submit it is not controlling, inasmuch as it arose under the Inheritance Tax Act of 1921.

The court below stated in its opinion that the California tax is not distinguishable from the Massachusetts inheritance tax, and relied upon its earlier decision in the case of *Merrill* v. *United States*, 66 C. Cls. 136. The *Merrill* case was clearly overruled by this Court in *Leach* v. *Nichols, supra*, which we submit is controlling here.

CONCLUSION

For these reasons we submit that the judgment of the Court of Claims should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
H. BRIAN HOLLAND,
Attorney.

APRIL, 1932.

APPENDIX A

FEDERAL STATUTES AND REGULATIONS

STATUTES

Section 203 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 778, provides in part:

> SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate * * * and such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered; * * *.

Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides in part:

> SEC. 1113. (a) Section 3226 of the Revised Statues, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the

Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

Section 1316 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 314, provides:

SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:

"SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the revenue act of 1918.

This provision was reenacted, without change so far as is here important, by Section 1012 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 342) and by Section 1112 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 115).

REGULATIONS

Regulations 37 (1919 and 1921 revisions) provide in part:

ART. 106. *General provisions.*—Under these provisions of law two forms of relief

are afforded the executor in cases where he believes that an excessive amount of tax has been assessed against or paid by him, either upon the basis of the return or of the investigation conducted by the Bureau. The two forms of relief are:

(1) Claim for abatement on Form 47 where the tax has been assessed but not paid.

(2) Claim for refund on Form 46 where the tax has been paid.

* * * * *

ART. 110. *Claim for refund.*—Claims for refund of assessed taxes and penalties must be made on Form 46. In this case, as in the case of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. With the claim should be presented, in addition to the evidence:

(1) Collector's receipt evidencing payment of tax.

(2) Where the claim is made by the executor or administrator, a certified copy of the letters testamentary or of administration, and a certificate that the appointment remains in full force and effect.

(3) Where the executor or administrator has been discharged, a certified copy of the decree discharging him, and evidence as to the persons entitled to receive the refund, setting forth their names. Where the claim is made on behalf of a number of persons, there should be furnished a power of attorney duly executed by all the beneficiaries showing the claimant's authority to act in their behalf.

APPENDIX B

CALIFORNIA STATUTE

The California Inheritance Tax Act of 1913, Cal. Stats. 1913, pp. 1066, 1067, 1068, 1073, provides in part as follows:

> SEC. 2. A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, in the following cases:
>
> (1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any probate homestead set apart from said property.
>
> * * * * *
>
> SEC. 4. Such taxes shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed.
>
> * * * * *
>
> SEC. 10. (a) Any administrator, executor, or trustee having in charge or trust any leg-

acy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid;

* * * * *

These provisions were not changed by the amendments of 1915, Cal. Stats. 1915, pp. 418, 435.

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